ALASKA LEGISLATURE COMMITTEE FILES, 2005-2006 8672

11489 HOUSE JUDICIARY

claim from defending on the basis of accord and satisfaction. A defendant who had already prevailed in an identical action by the same plaintiff could not raise the defense of res judicata. A defendant sued by a plaintiff who lacked an interest would be forbidden to claim lack of standing; one sued by a minor could not assert the plaintiff's lack of capacity; and one subjected to a claim without service of process could not raise lack of personal jurisdiction as a defense. The anomalies--all unavoidable consequences of adopting FDIC's proposed "plain meaning"--cast ambiguity on the seemingly clear language of subsection .822(a)' s "notwithstanding" provision. [FN28]

FN28. At least one federal court interpreting CERCLA has recently suggested that the "notwithstanding" language in the federal statute should not be interpreted to bar defendants from asserting res judicata, collateral estoppel, accord and satisfaction, or statutes of limitations, because such an interpretation would yield "absurd results that Congress could not have intended." *See Town of Munster, Indiana v. Sherwin-Williams Co., Inc.*, 27 F.3d 1268, 1271-72 (7th Cir.1994) ; *cf. Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771-74 (9th Cir.1994) (affirming dismissal of section .822 claim on the ground of res judicata without expressly considering the "notwithstanding" language).

[7][8] Moreover, because "plain meaning" cannot exist in a vacuum, ambiguity is necessarily a creature of context. "As the Supreme Court has stated, 'in ascertaining the plain meaning of [a] statute, the court must look to the particular language at issue, as well as the language and design of the statute as a whole.' " [FN29] And "[w]hen a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole." [FN30]

FN29. *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1048 (Alaska 1992) (Compton, J., dissenting) (quoting *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. 1811); *see also Nash v. State, Commercial Fisheries Entry Comm'n*, 679 P.2d 477, 478 (Alaska 1984).

FN30. *Millman v. State*, 841 P.2d 190, 194 (Alaska App.1992).

***352** Considered in context with other relevant provisions, subsection . 822(a)'s meaning is hardly plain. The "notwithstanding" phrase must initially be read together with other parts of section .822 to which subsection .822(a) specifically refers: subsection .822(b)'s list of "defenses" and the "exception" created in subsection .822(i). [FN31] The relevant language is as follows:

FN31. Subsection .822(a)'s "notwithstanding" phrase currently refers to two other provisions: "the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825." *See* AS 46.03.822(a). But neither of these references appeared in the originally enacted version of subsection .822(a). *See* Ch. 39, § 2, SLA 1989. Since both references were added after the original enactment of subsection . 822(a), they are not relevant to establish the intent of the legislature that originally enacted the statute.

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves
(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of
(A) an act of war;
(B) except as provided under AS 46.03.823(c) and 46.03.825(d), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person
(i) exercised due care with respect to the hazardous substance; and
(ii) took reasonable precautions against the act or

omission of the third party and against the consequences of the act or omission; or
(C) an act of God; and
(2) in relation to (1)(B) or (C) of this subsection, that the person [discovered the release and began containment and clean up within a reasonable period of time].
....
(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that
(1) the harm caused by the release or threatened release is divisible; and
(2) there is a reasonable basis for apportionment of costs and damages to that person.[[FN32]]

FN32. AS 46.03.822(b) & (i).

As can be seen, subsection .822(b) creates three defenses to subsection . 822(a)'s strict liability scheme: an act of God, an act of war, or an unavoidable act of a third party. Each of these listed "defenses" centers on causation; each is triggered by the intervention of an outside actor, to which the law attributes the hazardous release, away from the original defendant. Hence, this specific category of defenses ameliorates the otherwise harsh effects of strict liability. So too, subsection (i) creates a specific exception that, when triggered by particular circumstances justifying the apportionment of partial responsibility to an outside actor or third party, ameliorates the harsh effects of joint and several liability.

The narrow focus of these defenses has significance in its own right, because "[w]here ... specific words follow[ ] general ones, [the statutory interpretation doctrine of *ejusdem generis*] restricts application of the general term to things that are similar to those enumerated." [FN33] As applied to the statutory phrase at issue, then--"notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section"--this interpretive canon strongly suggests that the terms "defenses" and "exception" refer not to the entire universe of potential general defenses, but to provisions and rules outside the original legislation that specifically mitigate the effects of joint and several liability.

FN33. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.17 (6th ed.2000); *see State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 412-13 (Alaska 1982) (applying this doctrine).

A companion provision of Alaska's 1989 hazardous substances legislation lends further ***353** credence to this reading. The statute immediately following subsection .822--AS 46.03.823--expressly creates a partial exception to strict liability for "hazardous substance response action contractors" (cleanup contractors), making them liable for hazardous releases only on the basis of negligence. [FN34] This provision certainly qualifies as a "defense" to subsection .822(a)'s strict liability provision-at least in the broad sense of "defense" that FDIC urges us to adopt insofar as it relates to the statute of limitations. Yet because this defense is not mentioned in subsection .822(a), it necessarily conflicts with FDIC's proposed "plain meaning" of subsection . 822(a)'s "notwithstanding" phrase: according to FDIC, the phrase's categorical preclusion of all conceivable defenses except those set out in section .822-- subsections .822(b) and (i).

FN34. As originally enacted by chapter 39, § 3, SLA 1989, section . 823 provided, in relevant part: (a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under

> the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.
> (b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly liable under this section.

[9] To apply FDIC's plain meaning of subsection .822(a), then, would nullify the section .823 defense, rendering the provision entirely superfluous. This, in turn would clash with the rule of construction holding that, as a general rule, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." [FN35]

> FN35. *Alascom, Inc. v. North Slope Borough Bd. of Equalization,* 659 P.2d 1175, 1178 n. 5 (Alaska 1983) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 46.06 (4th ed.1973)).

Legislation outside AS 46.03 reinforces the uncertainty generated by section .823. Just as subsection .822(a)'s "notwithstanding" phrase must be considered in context with the hazardous substances act as a whole, so too-other relevant laws must be considered, for "a seemingly unambiguous statute [may be] restricted by another act or where it must be considered in pari materia with another act." [FN36] In this regard, the comprehensive regime of statutes of limitations listed in AS 09.10 is particularly relevant, [FN37] because, as Laidlaw correctly observes, "if, as FDIC suggests, § . 822(a) has no statute of limitations whatsoever, it appears to be the only cause of action in Alaska with this distinction." [FN38]

> FN36. *Hafling v. Inlandboatmen's Union of Pacific,* 585 P.2d 870, 872 (Alaska 1978); *see also Anderson v. Anderson,* 736 P.2d 320, 321 (Alaska 1987) (seemingly unambiguous provision of Exemptions Act affected by Alaska Limited Entry Act).
>
> FN37. AS 09.10.010 provides: "A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." AS 09.10.100 provides: "An action for a cause not otherwise provided for may be commenced within ten years after the cause of action has accrued."
>
> FN38. *See generally* AS 09.10.010--AS 09.10.100.

The final factor to consider in determining subsection .822(a)'s meaning is its legislative history. In our view, this factor further indicates that the legislature did not intend to exclude the statute of limitations as an available "defense" to a private cost recovery action. In 1989 the legislature amended section .822, using the federal CERCLA statute as a pattern. [FN39] Congress originally passed CERCLA in 1980, including the defense-limiting "notwithstanding" language that appears in subsection . 822(a). [FN40] When first enacted, CERCLA incorporated a three-year ***354** statute for damages actions. [FN41] But two federal trial courts ruled that this statute of limitations did not apply to cost recovery actions under 42 U.S.C. § 9607--the CERCLA analog to subsection .822(a). [FN42]

> FN39. *See supra* note 8 and accompanying text.
>
> FN40. *See* Comprehensive Environmental Response, Compensation & Liability Act of 1980, Pub.L. No. 96-510, Title I, § 107. 94 Stat. 2767, 2781 (1980).
>
> FN41. *See* 42 U.S.C. § 9612(d) (1994).
>
> FN42. *See United States v. Dickerson,* 640 F.Supp. 448, 450-51 (D.Md.1986); *United States v. Mottolo,* 605 F.Supp. 898, 901-10 (D.N.H.1985).

In 1986, evidently responding to these rulings, Congress added statutes of limitations specifically covering CERCLA's counterparts to subsections .822(a) and (j). [FN43] Congress codified these new statutes as separate provisions within CERCLA, and did not amend CERCLA's "notwithstanding" language to mention them as "defenses" to a cost recovery action under CERCLA. [FN44] Obviously, then, Congress did not consider these statutes of limitations to be included among the kinds of "defenses" that were limited by CERCLA's "notwithstanding" provision--a provision directly corresponding to subsection .822(a).

FN43. *See* Pub.L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986).

FN44. *See* 42 U.S.C. § 9613(g) (1994). CERCLA's analog to AS 46.03.822(a) appears at 42 U.S.C. § 9607(a).

When the 1989 Alaska legislature revised section .822 by incorporating many features of CERCLA, [FN45] it omitted CERCLA's internal statutes of limitations. FDIC argues that this omission evinces the legislature's intent to withdraw any statute of limitations defense. But the defendants respond that the Alaska legislature's omission merely reflects its awareness that, unlike federal law, Alaska law already incorporated general statutes of limitations outside its hazardous substances act that would govern a direct action brought under subsection .822(a)

FN45. *See supra* note 8 and accompanying text.

The defendants' view is more plausible than FDIC's. As pointed out above, it is apparent that Congress considered CERCLA's internal statute of limitations to lie outside the sphere of "defenses" described by CERCLA's "notwithstanding" provision. If we accepted FDIC's proposed view of legislative intent, then, we would have to conclude that the Alaska legislature meant to give the "notwithstanding" language imported from CERCLA more significance in subsection .822(a) than Congress gave it in the federal context. Since no legislative history supports this interpretation, there is no reason to suppose that the Alaska legislature intended subsection .822(a) to abrogate Alaska's general statutes of limitations.

In sum, we conclude that the limiting language of subsection .822(a) does not preclude affirmative defenses, like the defense of statute of limitations, that have no inherent relation to subsection .822(a)'s imposition of joint and several strict liability for release of hazardous substances.

D. *An Action for Contribution Under Subsection .822(j) May Be Filed When a Subsection .822(a) Action Is Brought but "Accrues" for Purposes of the Statute of Limitations When Judgment Is Entered or Settlement Is Reached.*

[10] One of the certified questions before us is when a cause of action for contribution "accrues" under subsection .822(j). In 1989, when the legislature amended subsection .822(a) to mirror CERCLA, it also enacted a new subsection, AS 46.03.822(j), that gave defendants an action for contribution:

> *A person may seek contribution from any other person who is liable under (a) of this section during or after a civil action under (a) of this section.* ... In resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section.[[FN46]]

FN46. Ch. 39, § 2, SLA 1989.

The statutory language is clear that any party named in a direct subsection .822(a) action may commence an action for contribution at any time "during or after" the direct ***355** action. [FN47] We nevertheless conclude that even though subsection .822(j) allows a contribution action to be brought while a subsection .822(a) action is still in progress, the contribution action does not "accrue" for purposes of the statute of limitations until the

subsection .822(a) action concludes.

> FN47. Conversely, subsection .822(j)'s "during or after" language strongly suggests that a party has no right to seek contribution *before* an action has been commenced under subsection .822(a). Yet subsection . 822(j) also provides that "this subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section." In light of our decision that subsection . 822(a) creates a private cause of action, these provisions are not contradictory. In the absence of a third-party claim under subsection . 822(a), a potentially responsible party is free to bring a private action under subsection .822(a) against other potentially responsible parties and, in so doing, may seek or ultimately be limited to apportioned damages under subsection .822(j). *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir.1997). While this kind of anticipatory action might plausibly be characterized as a claim for contribution under subsection .822(j), because it derives from subsection . 822(a)'s creation of a private right of action, the anticipatory contribution action must accrue with the related subsection .822(a) action and be governed by its statute of limitations.

[11] Under CERCLA, an action for contribution accrues according to a contribution-specific statute of limitations, 42 U.S.C. § 9613(g)(3). Alaska has no analog to this provision on its books. Because the legislature unreservedly specified that contribution actions may be brought after a subsection .822(a) action concludes, and since an action under the subsection . 822(a) could conceivably remain pending for many years after its inception, the statute of limitations on such actions cannot realistically begin to run upon commencement of the action under subsection .822(a). [FN48]

> FN48. In this regard, we believe that subsection .822(j)'s language allowing potentially responsible parties to assert contribution claims "during" a subsection .822(a) action must be read to extend to actions prosecuted either in court or through administrative proceedings. If subsection .822(j) did not apply to parties who became subject to DEC administrative compliance actions, the benefit of a contribution action would accrue only to those who, through their recalcitrance, forced DEC to court. We do not believe that the legislature intended to force such cases into court. We note, however, that before the state's administrative process could qualify as an action, it would have to have the formal attributes of an administrative proceeding, including "a complaint-like pleading, which in turn set[s] in motion a formal process of dispute resolution." *Koss v. Koss*, 981 P.2d 106, 108 (Alaska 1999); *see also Agen v. State, CSED*, 945 P.2d 1215, 1219 (Alaska 1997) ; *cf. Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994) (listing a formal charging document that triggers a formal mechanism for dispute resolution as indicia of an agency "proceeding").

Moreover, interpreting subsection .822(j) to authorize a contribution action accruing upon or after judgment comports with general contribution case law elsewhere, [FN49] as well as with our own case law governing contribution in other contexts. For example, in *Providence Washington Insurance Co. of Alaska v. McGee* we recognized "that a claim for contribution is substantively separate from the underlying tort and does not arise until the contribution claimant has paid more than his or her proportionate share of the total claim." [FN50]

> FN49. *See* Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, 912-13 (1974).

FN50. 764 P.2d 712, 715 (Alaska 1988); *see also Alaska General Alarm, Inc. v. Grinnell*, 1 P.3d 98, 106-07 (Alaska 2000).

In the absence of statutory guidance other than the language of subsection . 822(j), and because subsection .822(j) specifically authorizes an action for contribution to be brought "during or after" a direct action under subsection . 822(a), we conclude that a contribution action under subsection .822(j) should not accrue for statute of limitations purposes until the direct cost recovery ends, either by judgment, settlement, or the conclusion of an administrative action. [FN51]

FN51. In our view, the rule we adopted in *Providence Washington Insurance Co. of Alaska v. McGee* should generally govern the date of accrual when a party who has paid damages assessed jointly and severally under subsection .822(a) files a contribution action to recoup the disproportionate payment. In at least one situation, however, reliance on the *Providence Washington* rule may not be warranted. When a party who has not been forced to pay an award or make cleanup efforts under subsection . 822(a) files a contribution action to apportion liability for the damages, the contribution action should be treated as accruing at the time of judgment on the subsection .822(a) action. Applying the *Providence Washington* rule to such cases would encourage subsection .822(a) judgment debtors to delay payment or cost recovery efforts, since any delay would be essentially cost-free and they could always trigger a new period for filing a contribution action by making a small payment on the judgment. In these situations and in other exceptional cases, subsection .822(j)'s express grant of discretion to consider "equitable factors determined to be appropriate by the court" will, we believe, empower trial courts to treat the contribution action as accruing upon entry of the subsection .822(a) judgment.

***356** E. *Nuisance and Trespass Actions Are Subject to Statutes of Limitations and the Discovery Rule.*

[12] Finally, we consider whether hazardous substance contamination can escape the statute of limitations by being characterized as a continuing nuisance or trespass. FDIC maintains that because the contamination of the Soldotna property "continued over time, and continue[s] up to the present time," no statute of limitations bars its claims for nuisance and trespass. To support this argument, it relies on our ruling in *Wood v. Alm.* [FN52]

FN52. 516 P.2d 137, 142 (Alaska 1973).

We are not persuaded that *Wood* is controlling. In *Wood*, we let stand the superior court's ruling that the defendant's failure to prevent the flooding of the Woods' property was a continuing nuisance that should be abated. [FN53] FDIC reads that case as describing a situation analogous to this case. But in *Wood*, the continuing nuisance was caused by a faulty dike for which the defendants were responsible. [FN54] While damage did occur soon after the dike began to leak, we recognized that compensation for that damage was time barred. [FN55] Nevertheless, the defendants were under a continuing obligation to prevent the inundation of the Woods' land, which they continuously failed to do; their leaky dike allowed water to seep onto the Woods' property up to the day the suit was filed. [FN56]

FN53. *See id.* at 141-42.

FN54. *See id.*

FN55. *See id.*

FN56. *See id.* (indicating that the superior court judge viewed the unrepaired conditions around the Woods' property).

In contrast, the defendants here are not

exacerbating the contamination that they allegedly caused during the late 1980s. And since they have lost their connection to the land, they cannot be characterized as maintaining an ongoing nuisance. Thus, we do not see how the contamination in this case differs from the harm ordinarily at issue in cases involving torts of a non-continuing nature, where discrete wrongful acts often have lasting consequences.

Insofar as there is a difference that relates to statutes of limitations, it is that injuries from seeping pollutants may be difficult to discover. That characteristic, however, does not militate in favor of describing the defendants' alleged actions as a continuing nuisance or trespass. Rather, the discovery rule adequately addresses this problem by delaying a cause of action's accrual until the plaintiff is aware, or reasonably should be aware, of its existence. [FN57]

> FN57. *See Cameron v. State*, 822 P.2d 1362, 1365-68 (Alaska 1991) (laying out the discovery rule and its purpose).

Here, given the parties' briefing, the undisputed facts discussed in the federal court's certification request, and the available record, we conclude that FDIC's allegations do not lend themselves to being framed as a continuing trespass or nuisance. [FN58]

> FN58. For the reasons that we advanced in discussing the availability of a statute of limitations defense to direct actions under subsection . 822(a), *see supra* Part III.C, we need not consider what statute of limitations applies to FDIC's trespass claim.

IV. *CONCLUSION*

In sum, we answer the certified questions as follows:

1. A statute of limitations defense is available for a direct cause of action under AS 46.03.822(a).

2. Alaska Statute 46.03.822(a) creates a private cause of action imposing joint and several strict liability.

***357** 3. A cause of action for contribution under AS 46.03.822(j) may be brought during the pendency of a direct action under subsection .822(a) but does not accrue for purposes of the statute of limitations until the direct action concludes.

4. Continuing trespass and nuisance claims for environmental contamination cannot be brought outside the limitations period under the undisputed circumstances presented here.

21 P.3d 344, 52 ERC 1488

END OF DOCUMENT

HOUSE COMMITTEE REPO[illegible]

(9)
Date Referred to Committee: April 14, 2005 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: 4/25/05

The RESOURCES Committee considered: **HB 269**

HOUSE BILL NO. 269 **HAZARDOUS SUBSTANCE RELEASE LIABILITY**

"An Act relating to contribution actions relating to the release of a hazardous substance; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
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CRT
EED
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DFG
GOV
HSS
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LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
DEC				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	OLSON	✓			
	Gatto			✓	
	LeDoux	✓			
	CRAWFORD			✓	
	ELKINS	✓			
Chair:	RAMRAS	X			
Chair:					

HB

272

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MEMORANDUM April 27, 2005

SUBJECT: Title of CSHB 272(JUD) (Work Order No. 24-LS0916\G)

TO: Representative Lesil McGuire
Chair of the House Judiciary Committee
Attn. Vanessa Tondini

FROM: Kathryn L. Kurtz KK
Legislative Counsel

Enclosed is the committee substitute you requested.

Please note that the title, while it accurately describes one aspect of the bill, may not be sufficiently descriptive of the entire contents of the bill to satisfy the requirements of article II, sec. 13, Constitution of the State of Alaska ("[t]he subject of each bill shall be expressed in the title.")

KLK:med
05-312.med

Enclosure

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: April 22, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 26, 2005

The JUDICIARY Committee considered: **HB 272**

HOUSE BILL NO. 272 **CARD ROOMS & OPERATIONS**

"An Act relating to card rooms and card operations."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 272 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

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UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
REV	1		✓	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gruenberg			✓	
	Kott	✓			
	Dahlstrom		X		
	Gara			✓	
	ANDERSON	X			
Chair:	McGuire			✓	
Chair:					

HOUSE COMMITTEE REPORT

4-22-05

(7)

Date Referred to Committee: April 18, 2005

FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: April 21, 2005

The LABOR AND COMMERCE Committee considered: **HB 272**

HOUSE BILL NO. 272 **CARD ROOMS & OPERATIONS**

"An Act relating to card rooms and card operations."

Recommends it be replaced with [ ] HCS *or* **[ ] CS** *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

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UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
REV			X	

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP (2)	DNP (2)	NR (2)	AM
Rep Crawford for	CRAWFORD				
Rep Coty	COTY	✓			
Rep LeDoux	LeDOUX			✓	
Rep Ottenberg	OTTENBERG		X		
Rep Kelsey	KELSEY			✓	
Chair:	ANDERSON	X			
Chair:					

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April 25, 2005

Perry Green
130 W. 4th Avenue
Anchorage, Alaska 99501

Re: Effect of HB 272/SB 165 (Card Rooms) on Indian Gaming in Alaska

Dear Mr. Green:

You have asked what effect, if any, the enactment of HB 272 or SB 165 would have on Indian gaming in Alaska. More specifically, you have asked me to address two questions:

(1) Would the enactment of HB 272 or SB 165 "open the door" to allow Indian tribes in Alaska to operate casino type gaming operations – referred to in the federal Indian Gaming Regulatory Act ("IGRA") as "Class III" games?

The answer is no. As discussed below, all of the card games authorized in HB 272 and SB 165 are Class II games for purposes of IGRA. IGRA authorizes Indian tribes to operate Class III games only if state law does not prohibit them. Alaska law currently prohibits all forms of Class III gaming, and nothing in either bill would authorize Class III games. So long as Alaska law continues to prohibit Class III games, IGRA would not authorize Indian tribes to operate them within Alaska.

(2) Would the enactment of HB 272 or SB 165 "open the door" to additional Class II Indian gaming in Alaska, beyond what is already authorized under existing law?

The answer is no. As discussed below, Alaska currently allows certain organizations and entities to conduct various types of Class II gaming under AS 05.15, including bingo, pull tabs, raffles, lotteries and various lottery type "classics," such as ice classics, rain classics, and salmon classics, among others. In addition, Alaska's criminal code exempts players engaged in social gambling, including players in social card games, from the criminal prohibitions against gambling in the state. Because Alaska currently allows Class II gaming, including card games, IGRA would allow Indian tribes to operate the types of

Class II card games allowed in HB 272 and SB 165 on Indian lands in Alaska – even if neither of those bills were enacted.

I. Brief overview of the Indian Gaming Regulatory Act.

The federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 et seq., provides authority for Indian tribes to conduct certain gaming operations on Indian lands.[1] There are three classes of games under the Act.

Class I games include social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations. Tribes may conduct Class I games on Indian lands without oversight by the Indian Gaming.

Class II games include bingo, lotto, pull-tabs, punch boards, tip jars and non-banking card games. Non-banking card games are games in which only the players may make wagers on the outcome, in contrast to "banked" card games such as blackjack, baccarat and chemin de fer, where the player effectively plays against the house or another banker and the house or banker collects money from losers and pays winners. Indian tribes may conduct Class II games on Indian lands if the tribe adopts an ordinance authorizing the activity and receives a permit from the Indian Gaming Commission. IGRA imposes various regulatory requirements on Class II gaming and restricts the uses of revenues from Class II gaming operations.

Class III games include casino type gambling, electronic or electromechanical facsimiles of any games of chance, slot machines, pari-mutuel horse and dog racing, and all other forms of gaming that are not Class I or Class II. For states located within the federal Ninth Circuit (including Alaska), Indian tribes may conduct a Class III game only if the state permits the particular type of game that the tribe seeks to operate. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995). Class III games, if they are allowed by the state, may be conducted only in conformity with a negotiated tribal-state compact entered into by the tribe and the state.

II. Enactment of HB 272 or SB 165 would not "open the door" to Class III Indian Gaming in Alaska.

HB 272 and SB 165 are identical bills that would authorize, under various limitations, the operation of card rooms in Alaska for the purpose of playing one or more

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[1] IGRA restricts Indian gaming to activities conducted on "Indian lands." This is a significant restriction, and is discussed briefly in Part IV of this opinion, beginning on page 4.

specified "non-banking" card games[2]. The specified games are poker, pan, rummy, bridge and cribbage. Since the only games allowed under the bills are non-banking games, they would be considered as Class II games and not Class III games.

IGRA allows Class III Indian gaming activity only if the activity is "located in a State that permits such gaming for any purpose by any person, organization, or entity." Alaska currently does not permit any type of Class III gaming activity, and nothing in either HB 272 or SB 165 would constitute such permission. Kathryn L. Kurtz, Legislative Counsel, recently provided an opinion to Representative Pete Kott in which she concluded that HB 272 would authorize only Class II games and would therefore not provide a basis for any Class III Indian gaming in Alaska. (Memorandum from Kathryn L. Kurtz to Representative Pete Kott, April 21, 2005.) I agree with her analysis, and rather than repeat it here, I have attached a copy of her opinion to this letter.

III. Authority of Indian Tribes to Conduct Class II Card Games under Existing Alaska Law.

IGRA, in 25 U.S.C. 2710(b)(A), allows an Indian tribe to engage in Class II gaming on Indian lands within the tribe's jurisdiction if

> such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law).

AS 05.15 currently allows charitable organizations and municipalities to conduct certain games that would be included within IGRA's definition of Class II games – specifically, bingo, pull tabs, raffles, lotteries and various lottery type "classics" such as the Nenana Ice Classic. Additionally, Alaska's criminal code exempts from prosecution for gambling offenses "a player in a social game." AS 11.66.200. "Social game" is defined in AS 11.66.280(9) as "gambling in a home where no house player, house bank, or house odds exist and where there is no house income from the operation of the game."

There are two alternative bases for concluding that IGRA would permit Indian tribes to operate the types of card games authorized under HB 272 and SB 165, even if neither bill were enacted. The first is that under the authorizing language quoted above, Alaska allows "such gaming" – that is, Class II gaming – of several types. It does snot matter that Class II gaming activity is limited to charitable organizations and municipalities. Alaska need only authorize these games for "any purpose by any person,

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[2] Both bills, at page 2, line 1, make it clear that the specified card games are "non-banking." The Senate Labor & Commerce Committee Substitute for SB 165 contains additional language to further emphasize that only "non-banking" games are allowed. The committee substitute, at page 2, lines 18 and 19, provides that wagers may be made only by a player with respect to his or her own game and that players may not make a wager on behalf of another individual.

organization or entity." As noted above, the Ninth Circuit Court of Appeals has ruled that for a Class III game, IGRA authorizes it only if state law permits the same type of game that the tribe seeks to operate. The Court has indicated however, that for Class II games, a less stringent standard will be applied, and a tribe may operate a Class II game if the state permits any person, organization, or entity to operate any Class II game. *See*, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d at 1258 n. 4. Under this analysis, IGRA would authorize Indian tribes to operate Class II card games solely by virtue of current law authorizing charitable organizations and municipalities to operate certain Class II games.

Alternatively, it may be argued that the *Rumsey* analysis should not be applied so broadly where Class II card games are at issue. That is because IGRA makes a distinction in its definition of Class II games between bingo, pull tabs and other bingo-like games on the one hand, and card games on the other. Specifically, IGRA defines Class II card games as games that "are explicitly authorized by the laws of the State" OR that "are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." 25 U.S.C. 2703(7)(A)(ii)(I) and (II). Current Alaska law meets that definition.

While current Alaska law does not "explicitly" authorize non-banking card games, it clearly does not "explicitly" prohibit them, because of the exemption in AS 11.66.200(b) from prosecution for players in social games. Moreover, since non-banking gambling is allowed in Alaska by players in homes, existing law allows for gambling on card games "at any location in the State."

Thus, Indian tribes are authorized under IGRA to operate non-banking card games under Alaska law as it exists today. Enactment of either HB 272 or SB 165 would not be required as a prerequisite to that authorization.

IV. Territorial Restrictions on Indian Gaming in Alaska.

Even though IGRA would authorize Indian tribes to conduct Class II card games in Alaska under existing state laws, there are additional restrictions in IGRA that may serve to minimize the proliferation of such gaming in Alaska. Indian tribes may conduct Class II and Class III gaming operations only on "Indian lands." Indian lands are defined in IGRA, 25 U.S.C. 2703(4), as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the

United States against alienation and over which an Indian tribe exercises governmental power.

In Alaska, the only lands within an Indian reservation are those within the Metlakatla reservation. The Alaska Native Claims Settlement Act revoked all other reserves set aside for Native use and lands conveyed to regional and village Native corporations are held in fee simple by each corporation. Native corporation lands, then, do not fall within the definition of "Indian lands" because they are not within an Indian reservation, they are not held in trust by the United States, and they are not subject to any restrictions on alienation or sale.

Another category of lands that arguably might constitute "Indian lands" are various Alaska village town sites. While these lands were at one time held in trust, they have since been re-conveyed to the villages in fee simple and are now free of any prior restrictions on the sale of these lands. As a result, village town sites would not qualify as "Indian lands" for purposes of IGRA.

The last category of lands that may constitute "Indian lands" under IGRA are individual Native allotments. There are a numb. r of parcels of land in this category scattered all over the state, and most, if not all, are held by individual Natives and are subject to federal restrictions against alienation. Thus, Native allotments would likely meet two of the three requirements needed to qualify as "Indian lands." What is less clear is whether Native allotments would meet the third requirement that the Tribe must "exercise governmental power" over the lands. This is a complex issue, however, and the result would depend on the facts surrounding the particular parcel in question and the extent to which a recognized tribe actually exercises any governmental powers within the boundaries of that particular parcel.

Please let me know if you have additional questions.

Very truly yours,

Susan A. Burke

Susan A. Burke

SAB:ps

Enclosure

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 21, 2005

SUBJECT: Card Rooms and Indian Gaming (HB 272)

TO: Representative Pete Kott

FROM: Kathryn L. Kurtz KK
Legislative Counsel

You asked whether this bill would affect Indian gaming in Alaska. I do not think this bill will open the door to class three gaming.

The federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., gives Indian tribes the authority to conduct gaming and gambling on Indian lands. The Indian Gaming Regulatory Act divides gaming into three classes:

> (1) Class I gaming includes social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations;
> (2) Class II gaming includes bingo, lotto, pull-tabs, punch boards, tip jars and non banking card games, as well as banking card games operated on or before May 1, 1988;[1] and
> (3) Class III gaming includes casino-type gambling, pari-mutual horse and dog racing, lotteries, and all other forms of gaming that are not class I or II gaming.

Class I gaming on Indian lands is within the exclusive jurisdiction of the tribes and is excluded from the provisions of the IGRA. Class II gaming on Indian lands is within the jurisdiction of the tribes but is subject to the provisions of the IGRA, including oversight by the National Indian Gaming Commission. For example, an Indian tribe seeking to conduct bingo games could choose to do so under the authority of state law or could do

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[1] Class II gaming does not include:

> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(6).

so separately under a permit from the National Indian Gaming Commission. Class III gaming activities are lawful on Indian lands only if authorized by a tribal ordinance or resolution, the activities are conducted on lands located in a state that permits such gaming for any purpose by any person, organization, or entity, and the activities are conducted in conformance with a tribal-state compact entered into by the tribe and state.

The Act provides a framework for negotiation of a tribal-state compact -- the tribe requests the state to enter into negotiations; upon receiving such a request, the state "shall" negotiate with the tribe in "good faith" to enter into such a compact.

There has been a good deal of litigation involving the various provisions of the IGRA since its passage. Some of that has involved the definition of "Indian lands." Although Alaska has only one remaining reservation, it is not safe to assume that there are no other "Indian lands" in Alaska. There certainly are parcels that are held in trust by the United States that might qualify for purposes of IGRA.

This underscores the significance of the difference between class II and class III gaming. If the legislature permitted class III gaming in state law, it would pave the way for tribes to conduct class III gaming on Indian lands under federal law. However, HB 272 permits only non-banking card games, specifically poker, pan, rummy, bridge, and cribbage games. Poker falls under IGRA's definition of class II games. 25 C.F.R. 502.3; National Indian Gaming Commission Opinion dated June 17, 1999, Re: Game Classification Opinion - "Poker Club.[2]" House banked card games, such as blackjack and baccarat, as well as player banked games, such as chemin de fer, are class III games, 25 C.F.R. 502.4; National Indian Gaming Commission Bulletin No. 95-1, April 10, 1995, but those types of games are not permitted in card rooms under HB 272.

KLK:med
05-284.med

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[2] According to this National Indian Gaming Commission opinion, "Banking games, as commonly understood and defined in the NIGC regulations, are games in which the banker (usually the house) takes on, that is, competes against, all players, collecting from losers and paying winners. *See* 25 C.F.R. 502.11(c). Conversely, non-banking card games are games where players play against each other. Poker is the typical example of a non-banking card game." The opinion went on to conclude that the proposed poker club would constitute class II, rather than class III gaming: "[A]s proposed, the players in the Nation's Club would play against each other in a non-banking format, not against the house or other banker. Turning Stone and its dealers would not have an interest, financial or otherwise, in the outcome of any poker game. Thus, the poker games to be played at the Club qualify as non-banking card games."

PRESBYTERIAN CHURCH (USA)

PRESBYTERY OF ALASKA

5750 Glacier Highway, C-16 • Juneau, AK 99801

(907) 780-6100
FAX (907) 780-4017

presbyt1@alaska.net
INBOX: PRT ALASKA

April 25, 2005

The Honorable Lesil McGuire
Chair, House Judiciary Committee
Alaska State House of Representatives, District 28
Room 118
State Capitol
Juneau, AK 99801-1182

Dear Representative McGuire:

It has come to our attention the House Judiciary Committee will be conducting a public hearing on House Bill 272 "An Act relating to card rooms and card operations". Unfortunately, prior commitments prevent our having an individual to speak at this hearing; however we would like to go on record strongly opposing the passage of this bill.

Included with this letter is a full statement giving some of the reasons for this position and additional supporting information, including a copy of a letter sent to the chair of the previous committee to hear this bill. In the interest of brevity, I will not restate all of the arguments listed in those documents, but they remain a significant part of our concerns.

As your committee considers this bill, we would urge you to seriously consider if this legislation, if approved, would permit the introduction of legal non-state regulated card rooms. We believe the Federal Indian Gaming Act would permit this. In an April 21, 2005 memorandum to Representative Pete Kott, Legislative Counsel advised that she did not think "this bill will open the door to class three gaming." We would agree. However, we also strongly believe that this bill would open the door to non-state regulated tribal run class two gaming. This would basically allow tribes to open their own legal card rooms, outside the standard control of the State. This question is never clearly addressed in the Counsel's memorandum. We strongly believe that you should seek an official answer to that question before allowing this bill to become law.

We have a number of additional questions as well. Does anything in this legislation restrict the location of the card rooms? Could a card room be opened adjacent to a public school? Could they be located adjacent to a place of worship? We found nothing in the bill to prohibit either situation, but we would think it poor public policy to see either of these happen.

The bill provides that a room owner could offer chips to players based upon a credit agreement. Is there any provision within the bill to establish how much credit could be offered? Is there any provision within this bill or existing state law to limit the amount of interest that might be charged for that credit? We would certainly hope that the State would not be introducing an unregulated credit environment.

It has been noted in previous testimony on this bill that it is believed that a number of illegal card rooms are operating within the State. We seriously doubt that this practice will stop with the creation of the legal card rooms. Obviously those playing in the current illegal rooms are not overly concerned with the illegality of their acts. We ponder why many of these players would opt to play in a legal room, which would be required to charge additional funds to cover the various state licensing costs and which would be required to report the player's winnings to the IRS. It is our fear that making gambling of this form legal in some places would simply serve to entice others into a habit which would eventually lead them to new illegal gambling operations.

On behalf of the Presbytery of Alaska, which is made up of 15 Presbyterian churches from Metlakatla and Ketchikan to the south and Yakutat to the north, I sincerely encourage you to consider these materials when debating this legislation.

Sincerely,

Elder Guy Warren
Stated Clerk, Presbytery of Alaska

enclosures

PRESBYTERIAN CHURCH (USA)

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INBOX: PBY ALASKA

April 20, 2005

The Honorable Tom Anderson
Chair, House Labor and Commerce Committee
Alaska State Representative, District 19
Room 408
State Capitol
Juneau, AK 99801-1182

Dear Representative Anderson:

It has come to our attention the House Labor and Commerce Committee will be conducting a public hearing on House Bill 272 "An Act relating to card rooms and card operations". At this time we are not certain that we will be able to have somebody speak in person on this bill at this hearing; however we would still like to go on record strongly opposing the passage of this bill.

Included with this letter is a full statement giving some of the reasons for this position and additional supporting information.

In particular, we would urge the committee to seek out independent research on the social ills that would accompany expanded legalized gambling within the state. We would also encourage the legislature to seek official opinions on the likelihood that this legislation would expand the amount of non-state regulated "Indian Gaming". Our belief is that contrary to some opinions, the enactment of this law would permit this expansion.

On behalf of the Presbytery, which is made up of 15 Presbyterian churches from Metlakatla and Ketchikan to the south and Yakutat to the north, I sincerely encourage you to consider these materials when debating this legislation.

Sincerely,

Elder Guy Warren
Stated Clerk, Presbytery of Alaska

enclosures

Statement by the Stated Clerk of The Presbytery of Alaska on House Bill 272.

The Presbytery of Alaska consists of the 15 member churches of the Presbyterian Church U.S.A. from Yakutat in the north to Metlakatla in the south.

We believe that this bill represents a significant step towards situations, which will not be in the best interest of the state government or the citizens it serves. It will increase the social problems we face, and it will result in decreased state control through the introduction of increased "Indian gaming".

While some hold that the approval of this legislation will eliminate illegal gambling, we believe that the experience seen in other localities would demonstrate this is not the case. We also believe that the solution to illegal gambling is not simply to legalize it. Certainly we would believe that the legislature would never consider such a solution to other illegal acts. We also believe that the costs the state will incur attempting to repair the social ills that gambling brings with it will exceed whatever benefits the approval of this bill might bring. These social ills include increased domestic violence, various psychological and social problems and an increased incidence of suicide.

While others might disagree, we firmly believe that the introduction of legal card rooms within the state, will, through the terms of the Federal Indian Gaming Act, permit the introduction of similar facilities in locations this bill does not intend, and without any of the controls the state would want to see. We have provided the committee with additional materials from the Federal Indian Gaming Commission detailing our reasons for this belief.

We believe it would be prudent and only right for the Legislature to seek detailed and independently researched estimates on the social costs expanding legalized gambling will bring, and independent legal opinions on the status of the Indian Gaming Laws before introducing more gambling to the state.

The people of this state have spoken in the matter of gambling and they spoke loudly. A proposal to expand gambling within the state was presented to the people in 1990. This measure was defeated by over 40,000 votes, almost a 2:1 margin. We would think it only appropriate that the legislature not override this clear mandate of the people.

Finally, we are not unaware of the increased popularity of card games in this country. Cable television has an impressive array of televised Poker games on display. The players of these games appear happy and certainly not troubled by the ills of gambling. There is a simple reason for this. Those seen in these programs have already won. As an example, the typical World Poker Tour program begins with six players. Each of these players will win thousands of dollars. What the program does not show is the hundreds of players who lost $15,000 to $25,000 each to finance the televised prizes. Do we ever hear the stories of the problems these losses cause? Naturally, we do not. Rest assured, these problems do exist there, and will exist at the card rooms, this bill would establish.

Our state's problems with illegal gambling are not nearly so desperate as to take the significant gamble this bill proposes. As a means of encouraging tourism, it should be remembered that the natural attractions we already have for bringing tourists to our state are unmatched, and provide a far better reason for traveling to Alaska than any card room ever could.

Thank you.

World Poker Tour Statistics

A recent World Poker Tour event had 376 players paying $15,000 each for the chance to win $1,770,218. Prizes are traditionally given to the top 20 to 30 players. This means that at least 346 of those players went home empty-handed, with $15,000 less than they started with.

Federal India. Gaming Act

In an article in the April 9, 2005 edition of the *Anchorage Daily News*, Anchorage Attorney Lloyd Miller is reported as holding that "it didn't appear as though the card room plan would trigger the potential for any tribal operations beyond what is allowed in the bill. I would strongly encourage the Legislature to seek an independent legal opinion on this matter. Our research into this matter leads us to a different conclusion, namely that the legalization of card rooms within the State of Alaska, would permit the tribal operation of their own card rooms, and that these rooms would be exempted from the limits provided in the original version of SB 195. The following is a quote from an overview of the Federal Indian Gaming Regulatory Act appearing on the Indian Gaming Commission website.

> "The Indian Gaming Regulatory Act, enacted in 1988 as Public Law 100-497 and now codified at 25 U.S.C. §2701, establishes the jurisdictional framework that presently governs Indian gaming. The Act establishes three classes of games with a different regulatory scheme for each. Class I gaming is defined as traditional Indian gaming and social gaming for minimal prizes. Regulatory authority over class I gaming is vested exclusively in tribal governments.
>
> Class II gaming is defined as the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith) and if played in the same location as the bingo, pull tabs, punch board, tip jars, instant bingo, and other games similar to bingo. Class II gaming also includes non-banked card games, that is, games that are played exclusively against other players rather than against the house or a player acting as a bank. The Act specifically excludes slot machines or electronic facsimiles of any game of chance from the definition of class II games. **Tribes retain their authority to conduct, license, and regulate class II gaming so long as the state in which the Tribe is located permits such gaming for any purpose** and the Tribal government adopts a gaming ordinance approved by the Commission. Tribal governments are responsible for regulating class II gaming with Commission oversight."
>
> URL: http://www.nigc.gov/nigc/laws/igra/overview.jsp
> **Emphasis ours**

Further elaboration on this opinion can be found in the opinions issued by the General Counsel of the Commission. Within the State of Arizona, the General Counsel deemed non-banked Poker games as a Class II game. For the State of New York, the General Counsel deemed a "Poker Club" as a Class II game. In both cases, the Counsel held that as Class II games, they were subject to tribal and federal regulation only. Full details on these opinions can be found on the Indian Gaming Commission's website at the addresses:

http://www.nigc.gov/nigc/documents/opinions/pokeraz.jsp
http://www.nigc.gov/nigc/documents/opinions/pokerclub.jsp

ALASKA STATE LEGISLATURE

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Legislative Council

Member:
Community and Regional Affairs
Judiciary
Labor and Commerce – Vice Chair

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REPRESENTATIVE PETE KOTT
DISTRICT 17 – EAGLE RIVER

Memorandum

To: Representative Lesil McGuire - Chair
House Judiciary Committee

From: Representative Pete Kott

Date: 22 April 2005

Re: HB 272 "An Act relating to card rooms and card room operations."

Dear Chairman McGuire,

HB 272 has pass out of the House Labor and Commerce Committee. I respectfully request that HB 272 to be scheduled for a hearing in House Judiciary Committee at your earliest possible convenience.

Thank you for your consideration.

ALASKA STATE LEGISLATURE

Chair:
Legislative Council

Member:
Community and Regional Affairs
Judiciary
Labor and Commerce – Vice Chair

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REPRESENTATIVE PETE KOTT

DISTRICT 17 – EAGLE RIVER

Sponsor Statement
for
House Bill 272
An Act relating to card rooms and card room operations

The growing popularity of poker is obvious to who have recently surf TV channels. Many networks, from ESPN to the Travel Channel, are regularly televising Texas Hold 'em tournaments and enjoying sky rocketing ratings and subsequent advertising revenues. Men and woman, old and young are joining the poker trend, which shows no signs of slowing. Due to this growth in interest, the intent of HB 272 is to allow social card games to be played in a tightly controlled public environment. Alaska can address the trend and bring this popular pastime into compliance with the safety and revenue laws of the state.

Under HB 272 card rooms would be limited to boroughs with a population of 30,000 or more and only one card room establishment per 30,000 people. These card rooms would be limited to players 21 years of age or older, and they would only offer non-banked card games such as poker, cribbage, rummy, etc.

In addition to the taxable revenue generated by the card rooms, food and drink purchases, and table charges, the establishments would also pay $10,000 per table annually to the state and would be required to hold quarterly tournaments to benefit a non-profit educational institution or group. As part of the licensing procedure, the card room operators would also be responsible for covering the administrative cost of licensing and subsequent enforcement through a $25,000 application fee.

In addition to the revenue and job creation, regulated card rooms would allow for players to enjoy their hobby in a safe regulated environment rather than playing in an unsavory, and often unsafe "back room." Currently many players, in addition to their friendly home game, play in underground games where the "house" takes in large profits with little assurance of "fair" play. Although not an everyday occurrence, players at these games have in the past been held up at gunpoint with little recourse because of the shady and illegal nature of the game.

By recognizing this trend and the fact that we already allow this type gaming in our homes, Alaska can address the issue head on and make card games a legitimate, safe, social activity that will increase revenue and job opportunities while minimizing the negative effects of underground gambling.

HB 272 - "An Act relating to card rooms and card operations."

Possible gross sales & employee information for card room operations

$4 Rake							
Tables	5	10	15	25	50	100	150
$90/hr avg	$450.00	$900.00	$1,350.00	$2,250.00	$4,500.00	$9,000.00	$13,500.00
9hrs/day avg table use	$4,050.00	$8,100.00	$12,150.00	$20,250.00	$40,500.00	$81,000.00	$121,500.00
Yearly Sales*	$1,478,250.00	$2,956,500.00	$4,434,750.00	$7,391,250.00	$14,782,500.00	$29,565,000.00	$44,347,500.00

*exclusive of non-card game operations

Avg # Employees Per Table	4.5	4.5	4.5	4.5	4.5	4.5	4.5
Total Number of Employees	22.5	45	67.5	112.5	225	450	675

Types of Employees

Dealer (Mimum Wage +Tips)	$250-300/day *
Cashiers (part-time)	$10/hr *
Janitorial/Maintenance	$8/hr *
Security	$10/hr *
Brushperson	$10/hr *
Shift Manager	$45,000/yr *
Card Room Manager	$65,000/yr *
	*Plus Benefits

HB

276

Alaska Native Health Board

4201 Tudor Centre Dr., Suite 105
Anchorage, Alaska 99508

Phone: (907) 562-6006
FAX: (907) 563-2001

April 28, 2005

Representative Lesil McGuire
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Dear Representative McGuire:

I am writing on behalf of Alaska Native Health Board urging you to oppose House Bill 276. HB 276 functionally eliminates the state's right to suspend tobacco endorsements when a store sells tobacco products to a minor. It is a step backward in the fight to stamp out youth tobacco use and undermines the state's position on enforcement, a key component to tobacco prevention and control.

Despite the falling smoking prevalence rates of Alaskan youth, smoking among young Alaska Natives is 30 to 40% higher than non-Natives, and half of youth Native smokers start by the age of 13. Furthermore, in the last few years, the use of smokeless tobacco has *risen* nearly 10% among Alaska Native young women.

While we celebrate the recent decline of youth smoking rates, there is clearly reason for continuing concern. To carry on the successes of the past 5 years, we must stay the course and maintain current penalties for violations of the law. The present system is both fair and effective.

Please do your part to combat youth tobacco use and vote against HB 276.

Sincerely,

Annette Marley, MPH

State of Alaska
Department of Community and Economic Development
Division of Occupational Licensing
BUSINESS LICENSE PROGRAM
P.O. Box 110806
Juneau, Alaska 99811-0806
E-mail: license@dced.state.ak.us

TOBACCO ENDORSEMENT PENALTIES

It is the responsibility of each business license tobacco endorsement licensee to be familiar with the proper sales of tobacco. This notice of tobacco endorsement penalties is provided in accordance with Alaska Statute 43.70.075(b).

Improper Sales of Tobacco Products

Requirement: A person who holds a tobacco endorsement, or an agent or an employee of a person who holds an endorsement acting within the scope of the agency or employment must comply with the following laws –

a. *AS 11.76.100 -- Selling or giving tobacco to a minor*
b. *AS 11.76.106 -- Selling tobacco outside controlled access*
c. *AS 11.76.107 -- Failure to supervise cigarette vending machine*

Penalty: A person who is convicted of violating the laws is subject to the actions listed below against the tobacco endorsement. Illegal placement of tobacco vending machines is also subject to the same penalties against the tobacco endorsement of the vending machine owner.

(1) 20 days suspension, and $300 civil penalty;

(2) 45 days suspension, and $500 civil penalty, if within 24 months, the person, agent, or employee while acting within the scope of the agency or employment, was convicted once;

(3) 90 days suspension, and $1,000 civil penalty, if within 24 months, the person, agent, or employee while acting within the scope of the agency or employment, was convicted twice;

(4) One year suspension, and $2,500 civil penalty, if within 24 months, the person, agent, or employee while acting within the scope of the agency or employment, was convicted more than twice.

AS 43.70.075(d)

Tobacco Endorsement Required

Requirement: A person, agent, or employee while acting within the scope of the agency or employment must comply with the following -

a. *AS 43.70.075(a) -- The need to obtain a tobacco endorsement*

b. *AS 43.70.075(g) -- The selling of cigarettes other than the amount of cigarettes contained in the manufacturer's original cigarette pack or contained in a cigarette carton or box; or incorrectly labeled.*

Penalty: A person who violates this section is subject to a tobacco endorsement suspension or lose the right to obtain a tobacco endorsement for a period of not more than

(1) 45 days; or

(2) 90 days, if within 24 months, the person, agent, or employee while acting within the scope of the agency or employment, violates a provision of this section.

AS 43.70.075(k)

Vending Machine Business

AS 43.70.075(a) and AS 43.70.075(l)

Requirement: A business license and a tobacco endorsement are required to sell tobacco products from a vending machine in a location or outlet as a retailer.

Penalty: If the endorsement of a person owning a vending machine for sale of tobacco products is suspended or revoked, the owner may not sell cigarettes, cigars, or other products containing tobacco during the suspension or revocation period through the use of vending machines at the location or outlet where the violation occurred. The vending machine may not be used at another location or outlet for the sale of tobacco products.

Tobacco Endorsement Sign

AS 43.70.075(f) and AS 43.70.075(p)

Requirement: A person holding a tobacco endorsement is required to post the warning sign provided by the department, in a conspicuous location to a person purchasing or consuming tobacco products on the premises.

Penalty: A person holding an endorsement who fail to post the sign is subject to a civil penalty of not more than $250 for each day of the violation. The penalty imposed may not exceed $5,000.

Business License Required

AS 43.70.075(b) and AS 43.70.075(s)

Requirement: A person who sells cigarettes, cigars, tobacco, or other products containing tobacco as a retailer must have a business license and a tobacco endorsement.

Penalty: A person who violates the requirement to hold a current business license and tobacco endorsement is subject to a civil penalty of not more than $250 for each day of the violation. The penalty imposed may not exceed $5,000.

The civil penalty may be imposed in addition to a suspension of a business license endorsement or the right to obtain a business license endorsement.

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FAX

Date: April 28, 2005 **Page 1 of 3**

To: Vanessa Tondini, Judiciary aide, Representative Lesil McGuire
Phone: 465-2995
Fax: 465-6592

From: Michelle Toohey for Alaskans for Tobacco Free Kids
Phone: 644-6418
Fax: 565-5587

Re: **HB 276**

Please see the attached letter opposing House Bill 276 currently in the House Judiciary Committee. We would appreciate it if you would please copy and distribute this letter to the committee members. Thank you for your attention in this matter. Vanessa, if you have questions, please feel free to give me a call. mt

Alaskans for Tobacco-Free Kids

April 28, 2005

Representative Lesil McGuire
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Re: House Bill 276 "An Act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products."

Dear Representative McGuire,

Alaskans for Tobacco-Free Kids is writing to express our strong opposition to House Bill 276. The legislation strikes at the heart of Alaska's efforts to deter smoking among kids. HB 276 effectively handicaps the enforcement component of illegal tobacco sales to minors, a cornerstone of the tobacco prevention and control program.

HB 276 would, for all practical purposes eliminate the state's ability to take away vendors' rights to sell tobacco when there's been an illegal sale. Without endorsement suspension, there is no financial incentive on the part of the vendor (the party profiting from the sale of tobacco), to comply. In fact, history shows us that suspension has been necessary. Prior to 2003, undercover sting operations found that more than 30 percent of Alaskan tobacco outlets were unlawfully selling cigarettes and other tobacco products to minors. During 2003, after endorsement suspensions were put in place, illegal sales to youth fell to 10 percent.

Companies who hold the privilege of a license to sell a legal, yet deadly and addictive product must also bear the serious responsibility for the sales of this product to kids. The company is the entity making the profit from sales of tobacco and therefore the company must bear the responsibility to hire capable, responsible, trainable and competent employees who follow the policy of not selling tobacco to those under the age of 19.

The system for enforcement of illegal sales of tobacco that Alaska has in place is working! High School smoking rates dropped by 50 percent from 1995 to 2003. The Department of Health and Social Services attributes the renewed effort to reduce illegal sales and increased enforcement action as a key piece in Alaska's comprehensive tobacco prevention and control program.

Please reject the policy set forth in HB 276 and retain Alaska's current law regarding illegal tobacco sales and enforcement procedures already in place.

Sincerely

Emily Nenon
American Cancer Society

Christie Garbe
American Lung Association of Alaska

Annett Marley
Alaska Native Health Board

Kristen Richmond
American Heart Association – Alaska Affiliate

AMERICAN LUNG ASSOCIATION.
of Alaska

FAX COVER SHEET

Date: 04/27/05 **Fax #:** 907-465-6592

To: Chairperson Lesil McGuire, House Judiciary Committee

From: Christie Garbe on behalf of ATCA

Regarding: HB 276

Please accept this resolution regarding HB 276.

Thank You—

Number of pages including cover: _____

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A L A S K A
TOBACCO CONTROL ALLIANCE

Resolution Opposing House Bill 276

"An Act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products."

Whereas the Centers for Disease Control and Prevention recommends the revocation of licenses for tobacco sales to minors as a best practice for tobacco prevention and control

Whereas the state of Alaska Department of Health and Social Services credits renewed efforts to reduce illegal sales of tobacco to youth through improved vendor training and increased enforcement actions across Alaska with the steep drop in youth smoking

Whereas House Bill 276 would eliminate the ability to take away vendor's rights to sell tobacco and leave little financial incentive to comply

Whereas, previously without endorsement suspension, Alaska exceeded federal limits on sales to minors and risked over $600,000 in federal substance abuse prevention/treatment funding

Whereas tobacco sales to youth has dropped 50% from 1995 until 2003

Whereas high school smoking rates have dropped by 50% from 1995 until 2003

Therefore be it resolved that the Alaska Tobacco Control Alliance opposes House Bill 276.

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FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 276
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Commerce
Title: Business License Tobacco Endorsement
RDU: Occupational Licensing (117)
Component: Occupational Licensing
Sponsor: Kott
Requester: Judiciary
Component No.: 2360

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (1175)	*	*	*	*	*	*

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other 1156 - Receipt Supported Services						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 276 amends the business licensing tobacco endorsement statutes to allow civil penalties to be assessed against an agent or an employee of a business owner who holds a tobacco endorsement instead of penalties being assessed only against the business owner who holds a tobacco endorsement. This bill will generate new revenue from civil penalties however, an amount cannot be established since the penalty is dependent on a violation occurring and the severity of the violation. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager
Phone (907) 465-2144
Division: Occupational Licensing
Date/Time 4/26/05 12:06 PM
Approved by: Edgar Blatchford, Commissioner
Date 4/26/2005
Agency: Commerce, Community, and Economic Development

(Revised 9/03/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB276-DHSS-DBH1-04-26-05
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: BUSINESS LICENSE ENDORESEMENT AND SALE OF TOBACCO . O MINORS
RDU: Behavioral Health
Component: Behavioral Health Grants

Sponsor: KOTT
Requester: HOUSE (JUD)
Component No.: 2669

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	(654.7)	(654.7)	(654.7)	(654.7)	(654.7)	(654.7)
1003 GF Match						
1004 GF	654.7	654.7	654.7	654.7	654.7	654.7
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This Bill removes the ability of the State to temporarily suspend the business tobacco endorsement of an establishment if an employee of that business sells tobacco to a minor.

If passed, this legislation could impact the overall federal Suostance Abuse Prevention and Treatment (SAPT)Block Grant award by 1% for each 1% over the targeted sell rate of 20%. For example, in FY2005 our Block Grant award is $4,676,744. If our SYNAR sell rate for 2005 is 30%, the penalty to Alaska would be $467,674.

The highest sell rate Alaska has experienced since the inception of SYNAR was 34% - 14% over the 20% benchmark. Based on a 34% sell rate, the fiscal impact to DBH would be $654,700 or 1% penalty for every 1% over the 20% requirement.

Prepared by: Bill Hogan, Director — Phone 465-3166
Division: Behavioral Health — Date/Time
Approved by: Joel S. Gilbertson, Commissioner — Date 04/26/2005
Agency: Department of Health and Social Services

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB276-LAW-C&FB-4-26
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to business license endorsements for tobacco products..."
RDU CIVIL
Component Commercial and Fair Business Collections and Support
Sponsor Representative Kott
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	********	********	********	********	********	********
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other-Interagency Receipts	********	********	********	********	********	********
TOTAL	********	********	********	********	********	********

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 43.70.075 (Alaska Business License Act) in several respects. First, it creates a structure of civil penalties for agents or employees of a holder of a business license tobacco endorsement, if that agent or employee is convicted of selling tobacco to a minor. (Under current law, the agent or employee would be subject to a fine for violating AS 11.76.100, but not subject to a an additional civil penalty). The Department of Law expects an additional workload may be created by passage of this legislation because low-wage employees will not be able to pay the civil penalties and will as a result, want to take the matter to a hearing. The Collections and Support Section may become responsible for collecting the unpaid fines, increasing an already overburdened section with additional collection responsibility. Second, the bill adds a new section to AS 43.70.075 that would impose a structure of sanctions on license-holders: license-holders who have a training program addressing

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 4/27/05 8:27 AM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 4/27/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

ANALYSIS CONTINUATION

tobacco sales would be subject to monetary penalties if their agents or employees sell to minors; license-holders without a program would be subject to suspensions of their tobacco endorsements as well as civil penalties. The Department anticipates an increase in the number of hearings requested by license holders of tobacco endorsements. In addition, because the bill expands the issues that are considered at a hearing requested by a license-holder, the Department also expects that these hearings could require increased time for preparation and participation in the hearing process. The Department of Law currently has an RSA with Health and Social Services to assist with enforcing existing tobacco sales laws. It is expected that the increased workload resulting from passage of this legislation would be paid for by that client. In the capital budget, the Department of Law has a request for replacement of the collections data-base. If that appropriation comes to pass, it will streamline the collections process and allow for expansion without increased cost. Without the appropriation, the Collections section will not be able to expand beyond its current capacity; increased demand will slow the system down, not create new revenue.

ALASKA STATE LEGISLATURE

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REPRESENTATIVE PETE KOTT
DISTRICT 17 – EAGLE RIVER

Memorandum

To: Representative Lesil McGuire
Chair, House Judiciary Committee

From: Representative Pete Kott

Date: 21 April 2005

Re: HB 276 "An act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products."

Dear Chairman McGuire,

I respectfully request that HB 276 to be scheduled for a hearing in House Judiciary Committee at your earliest possible convenience.

Thank you for your consideration.

ALASKA STATE LEGISLATURE

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Judiciary
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REPRESENTATIVE PETE KOTT

DISTRICT 17 – EAGLE RIVER

Sponsor Statement
For HB 276

HB 276 amends the current Alaska Statute AS 43.70.075 dealing with the sale of tobacco to minors to:

- Stiffen financial penalties for noncompliance by employees and employers
- Recognize employers who have put education, monitoring and enforcement programs into effect and encourages others to do so
- Establish more predictable and fairer due process for the hearing of citations
- Encourage employees to be more diligent in checking ID at the point of sale.

More specifically the changes to the statute achieve the goals in the following ways:

Stiffening Penalties for Non-Compliance

- HB 276 increases the minimum fines for employers with education, monitoring and enforcement programs per violation from the current levels of $300, $500, $1,000 and $2,500 to $750, $1000, $2,500 and $3,500 respectively.
- HB 276 increases the minimum fines for employers without effective education, monitoring and enforcement programs per violation from the current levels of $300, $500, $1,000 and $2,500 to $500, $750, $1,500 and $2,500 respectively, in addition to having its tobacco endorsement suspended for a pre-determined period of time.
- HB 276 creates a separate fine for employee's violation of AS 43.70.075 in addition to fines already described at AS 11.76.100(f) (both dealing with the sale of tobacco to minors).

Recognizing and Encouraging Education, Monitoring and Enforcement Programs

- HB 276 would allow employers to demonstrate internal education, monitoring and enforcement programs as mitigating factors in administrative hearing resulting from violations.
- HB 276 provides that if no employer –sponsored education, monitoring and enforcement program is in effect at the time of an alleged violation, then the employer (1) Faces

suspension of its tobacco endorsement and higher fines than under current law (2) Is not afforded the opportunity to present evidence of mitigating factors or other circumstances at the administrative hearing.

Would require employees to sign a statement that they understand it is against the law to sell tobacco to minors and that they will bear some of the responsibility personally if they violate the law.

Establishing More Predictable and Fairer Due Process

- HB allows qualifying employers (employers with documented education, monitoring and enforcement programs) to assert defenses and provide evidence at administrative hearings for endorsement suspension regardless of the disposition of a case against the violating employee. Under current law, employers have little to no chance to present their own cases if an employee pleads no contest or guilty. This should encourage more employers to create education, monitoring and enforcement programs to prevent the sale of tobacco to minors.

Encourages Employees to be more diligent in checking ID at the Point of Sale

- Would require employees to sign a statement that they understand it is against the law to sell tobacco to minors and that they will bear some of the responsibility personally if they violate the law.
- Creates a separate cause of action against the employee for violating the statute in addition to AS 11.76.100(f).

Summary

With these changes to Alaska's statute, dealing with the illegal sale of tobacco to minors will still have the toughest suspension penalties of any state of the country and it will have stronger financial penalties than most other states, including Alaska's current statute.

The changes could also make Alaska one of the strongest states in the country in terms of employer-sponsored education, monitoring and enforcement programs, and lead to even better federal compliance.

Alaska has had good success in curbing underage smoking recently thanks to beefed up enforcement efforts by the State. The statute enacted by the Alaska Legislature in 2001 was a good first step towards curbing underage smoking, but more must be done.

We must look to employers to improve their own internal operation every day, and we should punish those employers who choose not to comply along and recognize those responsible employers who do make strong internal efforts at curbing underage smoking in a fair, balanced, and reasonable manner.

HB

295

Alaska State Legislature

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Representative Tom Anderson
District 19 - Anchorage

Sponsor Statement
HB 295

As the credit system has evolved over the years there have been many changes made to address concerns that have arisen. One of those concerns was the right of creditors to protect themselves from debtors who attempt to defraud them through manipulation of their assets. For example, if a person knows they will be unable to pay their obligations and "sells" their assets to a family member or friend for a nominal sum in order to protect those assets how will a creditor prove a fraud has been committed?

In 1918 the National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) to answer that question. That Act was adopted in 25 jurisdictions. In 1984, the 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The new act's intent is the same as the 1918 Act but the language has been updated and changes have been made to bring it into compliance with the Bankruptcy Reform Act of 1978 which made several significant changes to federal fraudulent transfer law.

The UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in question.

The availability and viability of credit providers in this country requires national standards. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

As well as the issue of uniformity there is the issue of modernity. The UFCA, which the UFTA replaces, was created in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfer Act answers that immediate need.

I strongly believe that Alaska should join with the 41 other states which have passed this Act.

I urge your support for this bill.

LS0843\A

Fraudulent Transfers

This page covers fraudulent transfer law, primarily the U.S. Uniform Fraudulent Transfers Act ("UFTA") and the cases interpreting the Act.

The glitz and glamour of offshore trust planning has overshadowed the practical fact that most asset protection cases are won or lost by commercial litigators in post-judgment collection and enforcement hearings in the local state and federal courts. These debtor-creditor disputes rarely focus upon the structure created by the debtor to shield his assets; instead, the salient issues almost inevitably concern the method of transfer of the assets into the structure. If the transfer is defendable, the structure is largely irrelevant (so long as the debtor has no ownership or control of that structure). But the converse isn't true: If the structure is defendable, the transfer to the structure may still be set aside as a fraudulent transfer.

Questions of whether particular transfers are or are not fraudulent transfers represent some of the most important questions in asset protection planning. These issues are resolved by reference to the UFTA in the 41 states that have adopted it. Thus, the study of the UFTA, its history, and the cases that have interpreted the Act, will provide the broadest overview in most U.S. states as to what type of transactions will, or will not, stand up to creditor scrutiny.

Uniform acts are, of course, anything but uniform. The UFTA, like the other "uniform" acts, was drafted by the National Conference of Commissions of Uniform State Laws a/k/a Uniform Law Commissioners - a completely voluntary group of law professors, former judges, and lawyers who simply have an interest in this area of practice. The Uniform Law Commissioners propose uniform laws to the states, but the individual state legislatures must independently ratify the Act. Of course, it is in this ratification that local politicking in favor of special interests causes slight changes to the language of the Act ultimately enacted for that state - slight changes to language that can be enormous in their practical effect.

Additionally, in each state the UFTA will sometimes be interpreted with reference to "other law" in that state, and such interpretation can dramatically change the impact of the Act. Thus, what would be a fraudulent transfer in Ohio might be a protected transaction in Florida. And what would be brilliant planning for a debtor in Texas might be a misdemeanor in California.

As we are limited in our resources and the time that we can spend on this project, we will not seek to keep up with the changes or variations from state to state except as where noted. This website is meant to give an overview of the UFTA and fraudulent transfer law in general, but not to answer specific questions in a specific state as to what is or isn't a fraudulent transfer. An attorney seeking resolutions to such questions in a particular state must consult the particular Act for that state and the cases cited thereunder.

NATIONAL CONFERENCE
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Uniform Fraudulent Transfer Act State Adoptions
May 9, 2005

State:	Statutory Citation:
Alabama	Ala Code §8-9A-1 *et seq.*
Arizona	Ariz. Rev. Stat. Ann. §44-1001 *et seq*
Arkansas	Ark. Stat. Ann. §4-59-201 *et seq.*
California	Cal. Civil Code §3439 *et seq.*
Colorado	Colo. Rev. Stat. §38-8-101 *et seq.*
Connecticut	Conn. Gen. Stat. §52-552 *et seq.*
Delaware	Del. Code Ann. tit. 6, §1301 *et seq.*
District of Columbia	D.C. Code Ann. §28-3101 *et seq.*
Florida	Fla. Stat. §726.101 *et seq.*
Georgia	Ga. Code §18-2-70 *et seq.*
Hawaii	Hawaii Rev. Stat. §651C-1 *et seq.*
Idaho	Idaho Code §55-910 *et seq.*
Illinois	Ill. Rev. Stat. ch. 740, §160/1 *et seq.*
Indiana	Ind. Code §38-18-2a1 *et seq.*
Iowa	Iowa Code §684.1 *et seq.*
Kansas	Kan. Stat. Ann. §33-201 *et seq.*
Maine	Me. Rev. Stat. Ann. tit. 14, §3571 *et seq.*
Massachusetts	Mass. Gen. Laws. Ann. ch. 109A, §1 *et seq.*
Michigan	Mich. Comp. Laws §566.31 *et seq.*
Minnesota	Minn. Stat. §513.41 *et seq.*
Missouri	Mo. Rev. Stat. §428.005 *et seq.*
Montana	Mont. Code Ann. §31-2-326 *et seq.*
Nebraska	Neb. Rev. Stat. §36-701 *et seq.*
Nevada	Nev. Rev. Stat. §112.140 *et seq.*
New Hampshire	N.H. Rev. Stat. Ann. §545-A:1 *et seq.*
New Jersey	N.J. Rev. Stat. §25:2-20 *et seq.*
New Mexico	N.M. Stat. Ann. §56-10-14
North Carolina	N.C. Gen. Stat. §39-23.1 *et seq.*
North Dakota	N.D. Cent. Code §13-02.1-01 *et seq.*
Ohio	Ohio Rev. Code Ann. §1336.01 *et seq.*

Oklahoma	Okla. Stat. tit. 24, §112 *et seq.*
Oregon	Or. Rev. Stat. §95.200 *et seq.*
Pennsylvania	Pa. Cons. Stat. tit. 12, §5101 *et seq.*
Rhode Island	R.I. Gen. Laws §6-16-1 *et seq.*
South Dakota	S.D. Codified Laws Ann. §54-8A-1 *et seq.*
Tennessee	Tenn. Code Ann. §66-3-301 *et seq.*
Texas	Tex. Business & Commerce Code Ann. §24.001 *et seq.*
Utah	Utah Code Ann. §25-6-1 *et seq.*
Vermont	Vt. Stat. Ann. tit. 9, §2285 *et seq.*
Washington	Wash. Rev. Code §19.40.011 *et seq.*
West Virginia	W. Va. Code §40-1A-1 *et seq.*
Wisconsin	Wis. Stat. §242.01

Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

Why States Should Adopt the...

Uniform Fraudulent Transfer Act

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law.

Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

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Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Fraudulent Transfer Act

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal -- to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in 26 states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA -- it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim. . . ." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

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Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

A Few Facts About The...

UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE:
Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN:
The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY:
Amercian Bar Association

STATE ADOPTIONS:

Alabama	Iowa	North Dakota
Arizona	Kansas	Ohio
Arkansas	Maine	Oklahoma
California	Massachusetts	Oregon
Colorado	Michigan	Pennsylvania
Connecticut	Minnesota	Rhode Island
Delaware	Missouri	South Dakota
District of Columbia	Montana	Tennessee
Florida	Nebraska	Texas
Georgia	Nevada	Utah
Hawaii	New Hampshire	Vermont
Idaho	New Jersey	Washington
Illinois	New Mexico	West Virginia
Indiana	North Carolina	Wisconsin

2005 INTRODUCTIONS:
Alaska
Mississippi

For any further information regarding the Uniform Fraudulent Transfer Act, please contact
John McCabe or Katie Robinson at 312-915-0195.

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FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB295-LAW-C&FB-1-19-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act adopting the Uniform Fraudulent Transfer Act and relating to fraudulent transfers of property."
RDU CIVIL
Component Commercial and Fair Business
Sponsor Representative Anderson
Requester House Labor and Commerce
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill creates the Uniform Fraudulent Transfer Act in statute and conforms it with applicable federal law. The current set of statutes, AS 34.40 relating to fraudulent transfers have not been modernized since they were created in 1949. This bill will assist creditors in collecting debts from debtors who have found new and more imaginative ways of hiding assets. The Act sets out numerous factors to be considered in determining whether there is fraudulent intent on the part of the debtor. The current law requires proof of the actual existence of the fraudulent intent which can only be done through circumstantial evidence. The bill also provides numerous remedies to creditors which are not available under the current law.

Passage of this legislation will have no foreseeable impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/19/06 10:33 AM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 1/19/2006
Agency Department of Law